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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 871

MINORU YASUI

v.

THE UNITED STATES OF AMERICA

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the District Court for the District of Oregon (R. 13–50) is reported in 48 F. Supp. 40. The opinion of Judge Denman, dissenting from the certification of questions by the Circuit Court of Appeals is not reported.

JURISDICTION

The certificate of questions of law upon which the Circuit Court of Appeals desired instruction for the decision of this case was filed on March

30, 1943. On April 5, 1943, this Court directed that the entire record be sent to this Court so that the whole matter in controversy might be considered. The jurisdiction of this Court rests on Section 239 of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The defendant, a person of Japanese ancestry, was convicted under the Act of March 21, 1942, of violation of the curfew order, which is also involved in *Hirabayashi* v. *United States*, No. 870. The question is whether the curfew measure was constitutional.[1]

CONSTITUTION, STATUTES, ORDERS, AND PROCLAMATIONS INVOLVED

The provisions of the Constitution, statutes, orders, and proclamations involved are set forth in Appendices A, B, C, and D to our brief in *Hirabayashi* v. *United States*, No. 870.

STATEMENT

An indictment under the Act of March 21, 1942, returned in the United States District Court for the District of Oregon on April 22, 1942 (R. 2–6), charged that the defendant, a person of Japanese

[1] The District Court ruled that the measure was unconstitutional as applied to American citizens, but determined that this defendant was not an American citizen. For reasons set forth, *infra*, we do not support the conviction on that ground.

ancestry born at Hood River, Oregon, and residing in Portland, Oregon, was not within his place of residence between the hours of 8 P. M. and 6 A. M. on or about March 28, 1942, contrary to Public Proclamation No. 3, effective after 6 A. M. on March 27, 1942, for all persons of Japanese ancestry, and that the defendant knew or should have known of the restriction involved.

Upon the trial before the court, a jury having been waived (R. 10), the Government proved and the defendant did not deny the facts establishing that the offense had occurred. The defendant took the stand as a witness in his own behalf and testified that he was born on October 19, 1916, at Hood River, Oregon (R. 148); that his father was a merchant and engaged in farming and his mother was a housewife (R. 151); that in July 1925, when he was about 8 years of age, he took a summer vacation trip to Japan and returned in September 1925 (R. 151); that he attended grammar school and high school in Hood River and received his Bachelor of Arts degree from the University of Oregon in 1937 and his Bachelor of Laws degree in 1939 at the age of 23 years (R. 153-154). He testified that after passing the bar examinations and admission to the bar in September he practiced law both in Hood River and for a short while in Portland (R. 155). His father wrote a letter to the Japanese Consul General in Chicago stating that he had graduated

from law school and recommending him for a position; the defendant also secured letters of recommendation from Dean Wayne L. Morse of the Oregon Law School and from other people in Hood River (R. 155). He stated that in connection with this position which he entered upon in April 1940 he took no oath of allegiance (R. 157). He stated that his duties were to prepare correspondence for the Consul's approval and on various occasions he attended meetings of civic organizations to explain the position of Japan in the Far East (R. 158). He testified that on December 8, 1941, he resigned his position in which he was paid $125 a month "Because I felt that as a loyal American citizen I could not be working for the Japanese Consulate after the declaration of war" (R. 159, 160). A telegram from the defendant's father dated December 8, 1941, at 1 A. M., introduced into evidence, read as follows: "As war has started your country needs your service as a United States reserve officer. I as your father strongly urge you to respond to the call immediately" (R. 161). On the same date the defendant, a Second Lieutenant in the Army of the United States, Infantry Reserve, telegraphed to the military authorities offering his immediate services. On the same date his telegram was acknowledged by the military authorities who suggested he hold himself in readiness for military call to active duty. (R. 84.) In

response to another telegram from the defendant the military authorities replied on December 11, 1941, that the "effective date or details regarding your active duty not yet determined stop await further instructions" (R. 85). A letter of March 28, 1942, from the military authorities to the defendant advised him that a defect in vision of the right eye was waived for limited service and he was retained in the infantry reserve for eligibility for limited service only (R. 86, 167).

Defendant testified that after his return to Chicago from Hood River on January 12, 1942, he discussed with Special Agent Ray Mize of the Federal Bureau of Investigation the question of testing the constitutionality of the curfew and the possibility that such a test would cause public resentment or more stringent regulations (R. 169–170.) Defendant further testified that he took an oath of allegiance to the United States in December 1937 upon the completion of his R. O. T. C. course at the University of Oregon and that he never intended to, and to the best of his knowledge never did, renounce his American citizenship or express allegiance to any foreign sovereign (R. 173–174.) He testified that his father was at Camp Livingston, Louisiana, an Army camp for interned alien enemies (R. 175).

On cross-examination the defendant testified that his parents taught him to speak Japanese; that he attended a Japanese language school for

about three years while he was attending grammar school to learn to read and write Japanese (R. 176–177). He stated that he and his parents were members of the Japanese Methodist church (R. 178). Defendant admitted that he was aware that his father had received recognition by the Japanese Government for work he had done in promoting better relations between Japanese and Americans in the Hood River Valley (R. 181–182). He stated that he was employed by the Consul General in Chicago and was registered with the Secretary of State by the Consulate as one of its employees (R. 179). About once a month he delivered a speech on a topic suggested by the Consul General which he would write in English and then have the speech approved by the Consul General (R. 183). Some of the speeches brought forth the view which the Japanese Government wished to be presented to the American people on the war with China (R. 188–189).

On redirect examination the defendant testified that he attended the Japanese School on Friday afternoon and Saturday morning; that his father was active among the white people of the community as a member of the Rotary Club and as Director of the Apple Growers' Association, the biggest fruit cooperative in the region (R. 190); that through the efforts of his father and people like him the community, in which there had been anti-Japanese feeling in 1906, settled down to

a normal peaceful community in which Japanese and American farmers cooperated with each other (R. 191).

On examination by the court defendant testified that his people were Methodists, that he did not know the precepts of the Shinto religion and it was not practiced in his home (R. 194–195); that he did not accept the concept of the divinity of the Japanese Emperor (R. 195); that if he were on active duty he would have obeyed the curfew regulation but that as private citizen, although a reserve officer, he thought the regulations were not constitutional (R. 198).

The Government made an offer of proof of the testimony of the secretary and business agent of the Lumber and Sawmill Workers of Local No. 3 of Portland, containing about 2,200 members, to establish that prior to the promulgation of General DeWitt's regulations circumstances and incidents had occurred which threatened riots and danger to the Japanese population and disruption of war industry on the West Coast (R. 201–206). The defendant's objection to this testimony was sustained. The Government also offered to prove by an educator who lived in the Orient and was familiar with Japanese people the results of his studies of the Japanese, both alien and American-born, and the ideals, culture and type of loyalty of Japanese under the circumstances of the war between Japan and the United States. The de-

fense objected on the ground that such evidence would not be binding upon the defendant. The court stated that he would exclude the general offer. (R. 206–207.) The United States Attorney replied that the witness did not know the defendant but would testify concerning the Japanese culture and religion both in America and Japan. The court replied that he had no interest in the matter but that the prosecution could call the witness if it wished. Thereupon the Government did not press the matter but rested. (R. 207–208.)

The court concluded that although the curfew was unconstitutional as to American citizens, the defendant at his majority had elected allegiance to the Emperor of Japan rather than citizenship in the United States and found the defendant guilty as charged (R. 12, 50). On November 18, 1942, the court sentenced the defendant to the maximum punishment provided by the statute, $5,000 fine and a year of imprisonment (R. 52).

ARGUMENT

Unlike *Hirabayashi* v. *United States*, No. 870, which involves both the evacuation and the curfew measures, this case involves only the curfew. Our contentions in support of both these measures are set forth in detail in our brief in the *Hirabayashi* case, and we therefore respectfully refer the Court to that brief for a full statement of our position.

The District Court ruled that the statute was unconstitutional as applied to American citizens but that the defendant herein, by reason of his course of conduct, must be deemed to have renounced his American citizenship. We do not undertake to support the conviction on that ground. No such issue was tendered by the Government, and although it is true that the defendant testified that he had not renounced his citizenship (R. 172–173), we do not believe that the issue of loss of citizenship was in controversy. In these circumstances, we do not ask the Court to accept the ruling of the District Court with respect to citizenship, wholly apart from the question whether American citizenship can in general be renounced in the manner indicated (cf. *Perkins* v. *Elg*, 307 U. S. 325) and wholly apart from the possible applicability of the Nationality Act of 1940 (c. 876, 54 Stat. 1137; U. S. C., Tit. 8, Sec. 501, 801 *et seq.*) which undertakes to set forth the exclusive methods whereby citizenship may be lost.[2]

[2] Section 401 of the Nationality Act of 1940 specifies certain types of conduct by which United States nationality may be lost. Section 408, however, provides that expatriation by this conduct, with certain exceptions not here involved, cannot occur while the national is in the United States. Section 408 provides that the loss of nationality under the Act shall result solely from the performance of the acts specified in the statute.

CONCLUSION

The conviction should be affirmed on the ground that the curfew measure was valid as applied to all persons of Japanese ancestry.

Respectfully submitted,

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